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In The

Supreme Court of the United States

October Term, 1973

Docket No. 73-566

JOHN P. BAUER,

Petitioner-Appellant,

vs.

STATE OF NEW YORK,

Respondent-Appellee.

On Appeal from the New York State Court of Appeals

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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In The

Supreme Court of the United States

October Term, 1973

No.

JOHN P. BAUER,

Petitioner-Appellant,

vs.

STATE OF NEW YORK,

Respondent-Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Petitioner prays that a Writ of Certiorari issue to review the order and judgment of the New York State Court of Appeals.

OPINION BELOW

The affirmance in the New York Court of Appeals, which was rendered without any opinion, is set forth in Appendix A to this petition. The judgment in the intermediate state appellate court (Appellate Division—First Department) was, likewise, affirmed, but in that court petitioner's sentence was reduced from a term of six months imprisonment to a term of sixty (60) days. A copy of the court's order in the Appellate Division is annexed hereto as Exhibit B to this petition.

JURISDICTION

The judgment of the New York State Court of Appeals was entered on July 3, 1973. That judgment affirmed the order of the New York State Supreme Court, Appellate Division—First Department, entered on March 26, 1973, affirming the judgment of conviction in the trial court, while reducing petitioner's jail sentence from six months to sixty (60) days.

The jurisdiction of this court is invoked under 28 U.S.C. Section 1257(3).

At the time this petition was being prepared, there was pending in the New York Court of Appeals petitioner's application to amend the remittitur in this case to state that such court did consider and pass upon petitioner's constitutional claim regarding denial of a speedy trial. This application was made during the summer recess of the New York Court of Appeals which did not reconvene until September 17, 1973. Petitioner's pro forma motion has not yet been decided (September 24, 1973).

QUESTION PRESENTED

Was the petitioner denied his right to a speedy trial under the Sixth Amendment to the United States Constitution, and in violation of this Court's holding in *Barker v. Wingo*, 407 U.S. 514, where the delay between indictment and trial was in excess of four (4) years; where petitioner had twice vainly demanded a speedy trial, and where petitioner was prejudiced by the death of his excellent and long experienced counsel during the course of the State's protracted delay?

STATEMENT OF THE CASE

Petitioner was an officer in a close corporation engaged in the business of foreign trade in foodstuffs and agricultural commodities. The gross revenues of the firm (BNS International Service Corporation) grew to over $100,000,000 by 1964. In that year, however, petitioner's father, who was the dominating corporate principal, passed away and the remaining principals became irreversibly involved in intracorporate strife. While a disengagement of interests was worked out by the attorneys for the competing factions, and an ostensible detente was set up pending physical relocation of the now legally separated parties who were forced temporarily to occupy the same quarters, the dissolution was in fact marked by continuing hostilities on both sides. These included the hiring of private detectives, first by petitioner's former associates, and then by petitioner, to guard their respective interests—more specifically, against the rifling of files and other possible instances of commercial sabotage.

Petitioner, however, had made the mistake of choosing a detective agency randomly from the Yellow Pages and wound up with a firm styled "Protective Detective Agency"—a company operated by one Harold Getting. Getting began to visit petitioner in his BNS office almost every day. His ostensible purpose was to check on the performance of the guard, Francis Kennedy. His real

purpose soon became clear. Getting began to make frequent unsolicited comments about petitioner's plight at BNS, pointedly comparing petitioner to the city of Berlin, an enclave cut-off and surrounded by enemies. And having played upon petitioner's fears and uncertainties, Getting strongly suggested that petitioner Bauer's office might be monitored by Neumann—one of Bauer's former partners, and that it should be checked out electronically. Naturally, Getting knew people who could do the job. Getting's choice was one John Broady who, unknown to petitioner, was "one of the prime wiretap artists in the country"; a professional whose previous convictions for wiretapping did not deter him from continuing his illegal activities. The other "friend" of Getting was one Walter Miller, a self-styled electronics expert who built eavesdropping devices and sold and used them in illegal eavesdropping and wiretapping operations.

By feeding Bauer a line about the complexities of wiretapping and eavesdropping, admittedly with the purpose of drumming up business and selling electronic equipment, Miller, Getting and Broady first performed a simple electronic sweep of Bauer's office which, not surprisingly, was reported to be inconclusive. Miller then installed wiretapping devices in the phones of Werner Neumann and Charles Palermo, the company comptroller, explaining that it was all part of the process of ascertaining whether Bauer was being overheard. Though Miller testified that the wiretaps were requested by Bauer to listen in on Naumann and Palermo, the jury acquitted petitioner on the counts relating to this incident.

In any event, before any conversations could be overheard, Neumann and Palermo had trouble with their phones and called in the telephone company. The telephone company discovered the devices and called in the District Attorney. The District Attorney's detectives,

who had previously seen electronic equipment made by Miller, then called in Miller. Miller confessed to installing the wiretap and agreed to work with the District Attorney who was highly interested in the activities of John Broady and Harold Getting.

Several days later, Miller, now a police agent, built a eavesdropping device and placed it in the office of Werner Neumann, though the police disconnected the battery before any conversations could be overheard. Petitioner was arrested a year and a half later (December, 1966), and more than four years later was convicted upon one count for attempted eavesdropping, as a result of Miller's installation. Though Broady and Getting, the architects of the crime, received only suspended sentences upon pleas of guilty, Bauer, after trial, was astoundingly given a term of six months in jail.[1]

1. The original indictment of December, 1966 was amended in February, 1967 by the present indictment.

REASONS FOR GRANTING THE WRIT

The crimes charged in the indictment occurred in July, 1965. Petitioner was not arrested, however, until December, 1966, a year-and-a-half later. From December, 1966, the date of the original indictment,[2] until January 20, 1971, the date of the trial,[3] the case was on the trial calendar 42 times. During this four-year period, the defense made at least two motions to dismiss the indictment on speedy trial grounds, the first occurring on February 23, 1967, the second on May 8, 1968. Yet, not even this second demand for a speedy trial produced any results for another two-and-a-half years. While a few of the adjournments were requested by petitioner because of the death of counsel in 1970, the overwhelming number of continuances were requested by the People, and in many instances were granted without the consent of the petitioner. This exorbitant delay of four years from indictment, and five and-a-half years from the events charged in the indictment, clearly denied the appellant his Sixth Amendment rights *(Barker v. Wingo*, 405 U.S. 514; *Arrant v. Wainwright*, 468 F. 2d 677; *United States v. Perry*, 353 F.S. 1235).

While the People show excuse for some of the delay attributable to pretrial procedures in which the defendants must be deemed to have acquiesced, there were nonetheless, very long periods of delay which are substantially left unexplainted in the record. Here, outside of the necessary defense delay occasioned by the death of petitioner's attorney, the repeated insistence of the petitioner on a speedy trial was constantly overriden by further prosecution efforts to adjourn the case. And no good cause appears in the record to justify the denial of a

2. The first trial was terminated by a mistrial during the voir dire. The trial below commenced five days later, on January 25, 1971.

3. The Appellate Division of the New York State Supreme Court reduced this sentence to a term of imprisonment for sixty (60) days.

speedy trial to petitioner. Consequently, the obligation of the prosecutor to move the trial promptly was not met, and petitioner was, accordingly, entitled to a dismissal of the indictment.

Counsel has procured the minutes of proceedings with respect to each adjournment. In those instances where no minutes have been procured to match an adjourned date, as shown, in the docket entries, there is no record of any minutes having been taken by any reporter on the date in question.

On February 23, 1967, petitioner was arraigned on the instant superseding indictment. Importantly, through his counsel, the late Harris Steinberg, petitioner moved immediately for a speedy trial. The prosecutor requested two weeks to answer petitioner's pre-filed motions. Despite petitioner's threshold motion for a speedy trial, the case was kept off the calendar nine (9) months. It is clear that petitioner's immediate demand for a speedy trial triggered the operation of his Sixth Amendment rights (*Barker v. Wingo*, 405 U.S. 514; *United States v. Rucker*, 464 F.2d 823).

On October 23, 1967, the case reappeared on the trial calendar, but was adjourned. Petitioner was in Europe at the time, on business, and had been excused from appearing by the prosecutor. Two other defendants were also absent and it appears that the case had been placed back on the calendar with very short notice. At all events, the prosecutor, himself, adjourned the matter for one month.

On November 20, 1967, petitioner was still in Europe on business and his counsel applied for an adjournment, which was granted, to December 5, 1967. The district attorney had excused petitioner from appearing. With two

other defendants also absent, the prosecutor told the court he was "ready".

On December 5, 1967, petitioner appeared with his counsel. All defendants were present, except the prosecutor's informant Miller, who was still, apparently, being carried as an active defendant. This procedure raises grave doubt that the prosecution was actually ready for trial. The matter was adjourned for one week, to December 12, 1967. It also appears that the defendants were excused from appearing on future adjourned dates subject to notice from the prosecutor and their attorneys.

On December 12, 1967, petitioner's case was not called. The case of John Broady (Ind. No. 4822-66) was, however, on the calendar and the proceedings relating thereto show that the prosecutor had determined to give a trial preference to this case — thus placing petitioner's matter in limbo.

On January 3, 1968, all interrelated eavesdropping cases, involving a multitude of defendants, were on the calendar. Four attorneys indicated that they were in the process of having motions related to the cases decided. Petitioner's motions, it will be remembered, had been served and filed 11 months earlier. The trial court took all motions under consideration and the matter was adjourned to January 12, 1968.

On January 12, 1968, petitioner's trial attorney, was engaged in another trial. His associate appeared and the matter was adjourned to January 23, 1968. On January 23, 1968, the case was adjourned to January 31, 1968.

Reasons for Granting the Writ

It does not appear that the case was ever placed on the calendar on January 31, 1968. Indeed, petitioner's case did not again come before a justice of the court until May 1, 1968 — some three months later! At that time, the People indicated they were ready as to John Broady. By this time, however, Broady's attorney was out of the case, having suffered a heart attack. New counsel (Maurice Edelbaum) had entered the case in early March, 1967, and had made motions on behalf of Broady. His associate appeared and asked for an adjournment to June 15, 1968, in view of Edelbaum's other stated engagements. A heated and protracted colloquy developed over this and the court itself suggested that the case be put over to September, 1968.

Interestingly, during the course of argument, the reason for extensive prosecutorial delay peaked out of the colloquy. In this connection, counsel for Broady advised the court that illegal eavesdropping had occurred on the prosecutor's part—so that a dismissal of the Broady cases had been contemplated. The court adjourned the matter to May 8, 1968, to decide finally the issue of a further adjournment for Broady - and all attorneys were directed to produce their clients on the 8th.

On May 8, 1968, the court docket — most importantly — shows that petitioner again moved to dismiss his own case by reason of failure to prosecute! On the call of the calendar, petitioner was personally present. The court commenced to discuss the varied commitments in other courts of Broady's new attorney, Mr. Edelbaum. In the light of his particular situation, the court adjourned all the cases to September 1968 Term of the court and gave the prosecutor a direction quickly to advise all attorneys of which of the 5 wiretapping cases which were involved the District Attorney intended to move first. Then — on the record itself — counsel for petitioner specifically made application to dismiss his case for failure to prosecute. The

court denied the motion, but was careful to have the application for such relief received on behalf of all defendants.

During the summer months which ensued, the prosecutor never gave notice as to which of the five (5) separate wiretapping cases he was going to move for trial. On September 3, 1968, the prosecutor told the court that he was now going to try an altogether unrelated case. Accordingly, all the wiretap cases were adjourned by the prosecutor to September 9, 1968. An additional reason urged for the adjournment by the prosecutor was that the attorney for Marie Basile (a defendant in a wiretapping case *other* than defendant's case) had died. Using that attorney's death as an excuse, the prosecutor told the court the "other cases" would also have to be adjourned. On this occasion, although neither petitioner nor his attorney was present, the prosecutor raised no complaint. The only defendant present was John Broady, a fact indicating that it was only his cases, and Mr. Edelbaum's availability to represent Broady, which was the prosecutor's concern. Mr. Edelbaum was in court.

On the next adjourned date, September 9, 1968, neither defendant nor his attorney, Harris Steinberg, Esq., were present. The prosecutor explained to the court that Mr. Steinberg had telephoned him and he had told Steinberg that he was starting the *Glucksman* case with Mr. Edelbaum ("I [Mr. Andreoli] told him [Mr. Steinberg] what the situation is"). The prosecutor then had the cases put over for two weeks.

On October 28, 1968, all the *Broady* cases were adjourned to November 18, 1968. No reason is given for this adjournment.

On November 18, 1968, the case was curtly adjourned by the court to December 4, 1968. Although the

adjournment was stated to be "on consent", neither petitioner nor his attorney were present.

No minutes of adjournments have been able to be secured for apparent adjournments which took place on December 4, 1968 and March 10, 1969. On April 18, 1969, the prosecutor was engaged in another trial and Broady's attorney was also off trying a case elsewhere. His emissary won a week's adjournment for the defendant Broady. Several of the defendants and their attorneys were absent—again illustrating the hopelessness of getting the cases started while the prosecutor and Edelbaum were probing each other out on their respective calendars and engagements.

On April 24, 1969, the conflict erupted again with the court utterly beside itself over the delay. The trial justice began to speak of the issue of "disciplinary action" and marked the case against Broady "ready" — to follow the case then on trial. Edelbaum's frustrated emissary pleaded in vain that Edelbaum had just finished a nine weeks trial with the prosecutor, Mr. Andreoli. He asked, on the record, to know which *Broady* case the prosecutor intended to move for trial. The prosecutor gave no answer to this question and the debate continued to swirl about over the availability of the busy Mr. Edelbaum. The prosecutor never stated he was ready to try petitioner Bauer.

On April 28, 29, and May 20, 1969, all the *Broady* cases were marked ready and passed. But on July 8 and July 15, 1969, all these cases were again adjourned.

On August 1, 1969, petitioner was in Europe on business and his case was adjourned to September 5, 1969. The case did not appear on the calendar, however, until September 10, 1969 and was adjourned to September 17, 1969.

Reasons for Granting the Writ

On September 17, 1969 — three years after the initial indictments — the prosecutor moved to consolidate four of the indictments against Brody only for trial. On this occasion, the prosecutor candidly remarked that it was Mr. Edelbaum's busy calendar over the preceding years which resulted:

> "in a large number of defendants being unable to go to trial."

Mr. Edelbaum noted that the prosecutor had never once informed him of which case — of the five *Broady* cases — he was going to try. He also pointed out that the prosecutor's motion to consolidate related only to Broady and that all the remaining defendants (including petitioner Bauer) would be getting separate trials. [This fact demonstrates beyond dispute Mr. Andreoli's lack of interest to try any defendant except Broady.]. The court reserved decision and the "Broady cases" were put over to September 19; and then again, to September 24, 1969.

The motion to consolidate was denied (September 24, 1969). Thereafter, the case was adjourned intermittently for another *15* months until petitioner's trial started in January 1971.

The foregoing history — assembled from the debris of endless adjournments — shows how the prosecutor utilized the engagements of Mr. Edelbaum to stall trials of the other defendants until each succumbed to the temptations of a plea — including Broady. Only Bauer — the businessman induced to utilize the services of the crafty Miller and Broady — held out for a trial, despite offers of a misdemeanor plea and a suspended sentence. Twice, at least, he vainly moved for a trial on grounds of undue delay. Ignoring these, the prosecutor utilized the excuse of not being able to nail down for trial the busy attorney who represented his real target — John Broady. It would have

been easier to grant petitioner Bauer a severance and to have proceeded to trial with him — as it was the prosecutor's duty to do. In the terrible, unconscionable, delay which developed, attorneys for two different defendants died — and one other attorney suffered a heart attack, thereby having to retire from the case.

In the end, even the prosecutor escaped having to try any one of the five *Broady* cases! When Broady's attorney finally wore the prosecutor out and won this convict-repeater Broady a suspended sentence — Andreoli lost interest in the *Bauer* case and cooly shifted it to an assistant subordinate to him. The extensive delay, however, left petitioner Bauer standing alone. For time and a dreaded illness had intervened to strike down Bauer's attorney. In a very real sense, the delay forced upon petitioner Bauer, over his repeated objections, cost him the assistance and guidance of a counsellor whose unique gifts could have supplied the slim margin necessary in this close case for a complete defense victory on all counts.

Petitioner was undeniably denied his repeatedly sought after right to a speedy trial — and those denials contributed, in a prejudicial fashion, to his conviction in this case.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

s/ Lawrence K. Feitell
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APPENDIX A—DECISION OF THE COURT OF APPEALS

(Filed July 3, 1973)

No. 328 73

The People & c.,

Respondent,

vs.

John P. Bauer,

Appellant.

Order affirmed.
No opinion.
All concur.

APPENDIX B—ORDER OF APPELLATE DIVISION

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on March 26, 1973.

Present—Hon. Harold Stevens, Presiding Justice,
Arthur Markewich,
Emilio Nunez,
Francis T. Murphy, Jr.,
Myles J. Lane, Justices.

The People of the State of New York,

Respondent,

-against- 6632

John P. Bauer,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Fein, J.), rendered, entered on September 27, 1971, convicting defendant after trial, upon a jury verdict, of attempted eavesdropping and sentencing him to imprisonment for a term of six months, and said appeal having been argued by Mr. Lawrence K. Feitell of counsel for the appellant, and by Mr. Hugh Anthony Levine of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the judgment so appealed from be and the same is hereby modified, in the exercise of discretion, by reducing the sentence to a term of 60 days; and as so modified, the judgment is affirmed.

Order of Appellate Division

The case is remitted to the Criminal Term, Supreme Court, New York County, for proceedings to direct defendant to surrender himself to said Court in order that execution of the judgment be commenced or resumed. (CPL 460.50, subd. 5.)

ENTER:

HYMAN W. GAMSO

Stevens, P.J., Markewich, Nunez, Murphy, Lane, JJ.

6632 The People of the State of New York

Respondent, H. A. Levine

-against-

John P. Bauer,

Defendant-Appellant. L. K. Feitell

Judgment, Supreme Court, New York County (Fein, J.), rendered September 27, 1971, convicting defendant after trial, upon a jury verdict, of attempted eavesdropping and sentencing him to imprisonment for a term of six months, unanimously modified, in the exercise of discretion, by reducing the sentence to a term of 60 days, and as so modified, the judgment is affirmed. In our opinion, under the circumstances of this case, the sentence was excessive to the extent indicated. The case is remitted to the Criminal Term, Supreme Court, New York County, for proceedings to direct defendant to surrender himself to said Court in order that execution of the judgment be commenced or resumed.(CPL 460.50, subd. 5.)

Order filed.

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JOHN P. BAUER,

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against

THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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IN THE

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October Term, 1973

No. 73-566

JOHN P. BAUER,

Petitioner,

against

THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

Preliminary Statement

This brief is in response to a petition for a writ of certiorari seeking review of a judgment of the Court of Appeals of the State of New York, rendered July 5, 1973, unanimously affirming without opinion a judgment of the Supreme Court, Appellate Division, First Department, rendered March 26, 1973, which unanimously af-

firmed without opinion a judgment of the Supreme Court, New York County, rendered September 27, 1971, convicting petitioner, after a jury trial, of attempted eavesdropping (former N.Y. Penal Law §738) and sentencing him to imprisonment for a term of six months (ARNOLD FEIN, J., at trial and sentence), which sentence the Appellate Division reduced to sixty days.

Petitioner remains at liberty on a stay of execution of judgment pending this Court's disposition of the petition for certiorari.

Question Presented

Whether the Court of Appeals correctly decided that petitioner was not deprived of a speedy trial by reason of his affirmative request for, or acquiescence in, the numerous pretrial adjournments of his case.

(In an order dated October 11, 1973, the Court of Appeals amended the remittitur to reflect that it had necessarily passed upon a federal constitutional question, to wit, "Defendant-appellant argued that the four-year delay from the time of his indictment to the time of his trial constituted a violation of his right to a speedy trial in contravention of the Sixth Amendment to the United States Constitution. The Court of Appeals held that appellant's constitutional rights were not violated").

Statement of the Case

In a five-count indictment filed on January 30, 1967, petitioner John P. Bauer, together with John Broady, Harold Getting and Francis Kennedy, was charged with attempted eavesdropping in violation of former New York Penal Law §738, tapping a telephone line in violation of former Penal Law §1423(6), and conspiracies to commit those crimes (Ind. No. 4844½, superseding Ind. No. 4844, filed on December 16, 1966). The indictment was one of many indictments charging unlawful eavesdropping and wiretapping which grew out of a two-year investigation by the New York County District Attorney's Office, and which were announced in December of 1966.

In brief, it was charged that Bauer employed Broady, Getting and Kennedy, and one Walter Miller, to install eavesdropping devices in the offices of his former business partners at the BNS International Sales Corporation in downtown Manhattan. After making one of these installations, Walter Miller was discovered by detectives of the District Attorney's Office Squad, and agreed to work as an undercover agent in return for consideration at the time of his sentencing. He was instrumental in securing many of the indictments and convictions that grew out of the two-year investigation, and was the principal witness at the trial of petitioner Bauer.

Codefendants Broady and Getting pleaded guilty prior to trial, and Kennedy was discharged on his own recognizance. After a separate trial, Bauer was convicted of one count of the indictment, and was sentenced on September

27, 1971 to imprisonment for six months. (The evidence at Bauer's trial was voluminous, and for the sake of brevity and convenience it will not be summarized in this brief, since the petition raises no issue respecting the evidence or conduct of the trial; a full summary of the evidence is contained in respondent's brief in the Court of Appeals.)

Before the Appellate Division, Bauer contended that the People's proof was rendered fatally defective by what he claimed to be a lack of evidence as to the operability of the eavesdropping device underlying his conviction; that the evidence showed him to have been entrapped as a matter of law; that he was deprived of his right to a speedy trial; and that his sentence was excessive. The Appellate Division affirmed his conviction unanimously and without opinion, in an order which reduced the sentence to sixty days. *People* v. *Bauer*, 41 A.D.2d 732 (1st Dept. 1973).

Leave to appeal to the Court of Appeals was granted by Chief Judge FULD in an order dated April 4, 1973. In that court Bauer abandoned his argument with respect to the operability of the eavesdropping device and also did not raise the issue of entrapment. Instead, he contended that the proof of his guilt was fatally devoid of evidence of the eavesdropping victim's non-consent; that the trial court erroneously declined to charge the jury on the offense of possession of eavesdropping instruments; that he was deprived of a speedy trial; and that his sentence, even as modified by the Appellate Division, was excessive. On July 5, 1973, the Court of Appeals unanimously affirmed the judgment of conviction without opinion. *People* v. *Bauer*, 33 N.Y.2d 624.

POINT

The Court of Appeals having found from the record that petitioner was not deprived of his right to a speedy trial because he affirmatively caused, or acquiesced in, the numerous pretrial adjournments of his case, no substantial federal question is presented which this Court ought to review.

It is apparent from the manner in which the speedy trial issue was framed in the Court of Appeals and from that court's no-opinion rejection of the claim, that in reaching its decision the Court of Appeals did not construe or apply the Sixth and Fourteenth Amendments any further than was required for its conclusion that petitioner waived his rights under these amendments because he affirmatively caused or acquiesced in the numerous pretrial adjournments of his case. Issue was joined by the parties not on the question whether a delay of four years between indictment and trial was unconstitutionally long, but on whether the record showed petitioner to have caused or acquiesced in the delay and thus waived his right to complain of it. Thus the Court of Appeals made a factual decision, on the basis of the record before it.* The only reviewable issue is whether the court's decision is supported by the record, and that issue is not a substantial federal constitutional question which this Court ought to review. Supreme Court Rule 19. Moreover, it is clear from a summary of the

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* Before allowing the appeal to be heard, the Appellate Division had seen fit to require, at respondent's instance, that Bauer include in the record on appeal copies of the minutes of all the pretrial adjournments (order dated August 10, 1972).

proceedings that petitioner caused or consented to the post-indictment adjournments:*

—A superseding indictment was filed on January 30, 1967, and Bauer pleaded not guilty to that indictment on February 23rd; at that same court appearance he moved for inspection of the Grand Jury minutes and an order for speedy trial and, with his consent, the matter was adjourned to March 10th (mins. of February 23, 1967).

—The next adjourned date for which minutes have been supplied is October 23, 1967. On that date the court was informed that Bauer—free on bail from the day of his arrest until the conclusion of the trial—was in Europe, and that it had been agreed between his counsel and the assistant district attorney that he need not return for the day's court appearance. Without his objection the matter thereupon was adjourned to November 20th (mins. of October 23, 1967).

—On the November 20th adjourned date the People announced that they were ready for trial. Bauer again was

* The crimes for which petitioner was indicted occurred in July of 1965; the indictment against him was filed on December 13, 1966, the same day that the District Attorney's two-year investigation of illegal wiretapping was concluded and indictments against numerous individuals were announced. To have filed the indictment against Bauer prior to this date would have exposed Walter Miller's role as an undercover agent and jeopardized the entire investigation (see, *e.g.*, 435-48). Thus, the initial one-and-a-half-year period between crime and indictment was perfectly justifiable and, in any event, the Sixth Amendment's guarantee of a speedy trial does not apply until one has become an accused. *United States* v. *Marion*, 404 U.S. 307 (1971); *accord, Hoffa* v. *United States*, 385 U.S. 293, 310 (1966) ("There is no constitutional right to be arrested"); *United States* v. *Ewell*, 383 U.S. 116, 122 (1966) ("the applicable statute of limitations * * * is * * * the primary guarantee against bringing overly stale criminal charges"); *United States* v. *Cadarr*, 197 U.S. 475, 478 (1905).

in Europe, his counsel explaining that the assistant district attorney had "consented graciously to permit that to be." Counsel for Bauer then moved for an adjournment to "a date in January," which the prosecutor opposed as "too long," saying "I would like to dispose of this case." A compromise was reached whereby the matter was adjourned —in the court's words—to "December 5th at the defendant's request" (mins. of November 20, 1967). That date saw the case adjourned to December 12th with the consent of Bauer's attorney (mins. of December 5, 1967), and from December 12th to January 3, 1968, due to the pendency of defense motions (mins. of December 12, 1967), and from January 3rd to January 12th, again due to pending defense motions (mins. of January 12, 1968). In each instance Bauer's counsel either consented to or acquiesced in the adjournment, and in no instance was Bauer actually present in court.

—An associate of Bauer's attorney requested and received, on the January 12th adjourned date, further adjornment to January 23rd because Bauer's attorney of record was actually engaged in another trial (mins. of January 12, 1968). That adjourned date saw the attorney of record request and receive a further adjournment to January 31st (mins. of January 23, 1968). The next adjourned date for which minutes have been supplied is May 1, 1968. On that occasion—over the prosecutor's strenuous objections—the attorney representing Bauer and his codefendants achieved adjournment of the matter to the September Term (mins. of May 1 and May 8, 1968).

—The case appeared on the calendar again on September 3, 1968, at which time the death of a codefendant's counsel required an adjournment for substitution of counsel, and

the matter was put over to September 9th (mins of September 3, 1968). On that date substitute counsel still had not been retained, requiring an adjournment to September 25th to which all defendants consented (mins. of September 9, 1968).

—The next adjourned date for which minutes have been supplied is October 28, 1968. On that date neither Bauer nor his counsel was present in court and an adjournment to November 18th was ordered (mins. of October 28, 1968). The minutes of that date reveal only that the case was called and there was an adjournment to December 4th by consent (mins. of November 18, 1968).

—The next adjourned date for which minutes are available is April 18, 1969. On that date it became apparent that prolonged adjournments were imminent because of the continued engagements on trial of Maurice Edelbaum, Esq., counsel for codefendant John Broady. Appearing in Mr. Edelbaum's stead, Mr. Feitell [Bauer's attorney on appeal] stated, "I'm ready now to make a commitment on behalf of Mr. Edelbaum for an early fall date, and that's the best I could do this morning, Judge." The assistant district attorney rigorously opposed such a lengthy delay, and it was arranged that Mr. Edelbaum would come into court on April 24th to give his commitment on a trial date (mins. of April 18, 1969). He did not appear on that date, but his representative committed him to a trial date in the early fall. In the meantime, the cases were marked to follow a case then on trial in that part (mins. of April 24, 1969). Thereafter, when the cases appeared on the calendar they were marked ready and passed (mins. of April 28 and July 8, 1969).

—The calendar call on August 1, 1969, revealed that Bauer was in Europe in violation of his bail conditions, and the matter was adjourned to September 5th, the court directing that Bauer's bail would be forfeited if he failed to appear on that date (mins. of August 1, 1969). Petitioner has not supplied the minutes of that adjourned date. On the adjourned date of September 17th, one of the codefendants moved for a stay of the trial pending the decision of this Court in *United States* v. *White*, a case involving the use of undercover agents (since decided, and reported at 401 U.S. 745 (1971)); decision on the motion for a stay was reserved, and the matter was put over to September 19th, and on that date to September 24th (mins. of September 17 and 19, 1969).

The remaining three dates for which minutes have been supplied show the non-appearance of the defendants and their counsel (mins. of January 19 and 26, 1970; April 20, 1970). In January of 1971 the case against petitioner went to trial.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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New York County

MICHAEL R. JUVILER
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Assistant District Attorneys
Of Counsel

October, 1973

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In The

Supreme Court of the United States

October Term, 1973

Docket No. 73-566

JOHN P. BAUER,

Petitioner-Appellant,

vs.

STATE OF NEW YORK,

Respondent-Appellee.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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In The

Supreme Court of the United States

October Term, 1973

No. 73-566

JOHN P. BAUER,

Petitioner-Appellant,

vs.

STATE OF NEW YORK,

Respondent-Appellee.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI

This supplement to our petition is respectfully submitted in order properly to complete our papers on this application which, at the time of their docketing on September 27, 1973, were still awaiting the decision of the New York Court of Appeals with respect to our application in that court to amend the remittitur. On page 2 of our main petition herein we advert to the fact that there was then "pending in the New York Court of Appeals petitioner's application to amend the remittitur in this case to state that such court did consider and pass upon petitioner's constitutional claim regarding denial of a speedy trial".

On October 11, 1973, the New York Court of Appeals granted our application as aforesaid. In this supplement to the petition we have set out, in Appendix C, the order of the New York Court of Appeals recognizing that petitioner's Sixth Amendment claim that he was denied his rights to a speedy trial was argued and passed upon in that court.

Supplement to Petition for a Writ of Certiorari

On October 17, 1973, the New York Court of Appeals granted petitioner a stay of execution of his sentence pending determination by this Court of his petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX C—DECISION COURT OF APPEALS
(Dated October 11, 1973)

Mo. No. 761

The People & c.,
Plaintiff-Respondent,

vs.

John P. Bauer,
Defendant-Appellant.

Motion to amend remittitur granted. Return of remittitur requested and, when returned, it will be amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon the following question under the Constitution of the United States, viz.: Defendant-appellant argued that the four year delay from the time of his indictment to the time of his trial constituted a violation of his right to a speedy trial in contravention of the Sixth Amendment to the United States Constitution. The Court of Appeals held that appellant's constitutional rights were not violated. Motion for a stay denied without prejudice to an application for such relief to a Judge of this Court.